RECENT SIGNIFICANT DECISIONS
Nuclear, Environmental and STAA Whistleblower Cases

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NUCLEAR AND ENVIRONMENTAL WHISTLEBLOWER DECISIONS

[Nuclear & Environmental Digest II B 3]

UNDERLYING JURISDICTION; COMPLAINT ABOUT ASBESTOS IN BASEMENT OF WORKPLACE; NOT PROTECTED ACTIVITY UNDER CAA UNLESS REASONABLE BELIEF THAT ASBESTOS WOULD BE EMITTED INTO AMBIENT AIR

In ***Kemp v. Volunteers of America of Pennsylvania, Inc.***, ARB No. 00-069, ALJ No. 2000-CAA-6 (ARB Dec. 18, 2000), Complainant filed a Clean Air Act whistleblower complaint on the theory that his discharge was motivated by his expression of concern over asbestos in the basement of his workplace resulting from torn insulation on utility pipes. The ARB held that for this activity to be protected, Complainant had to demonstrate that his complaint was based upon a reasonable belief that the asbestos would be emitted into the ambient air. The ARB reviewed the record, and finding no evidence that Complainant believed that the asbestos was a threat to the air outside the basement, dismissed the complaint.

The ARB found that the TSCA was not applicable because the asbestos was not located in a school, *see* 15 U.S.C. §§2641-2656 (1994), and that if the case was covered by the Occupational Safety and Health Act, "the sole whistleblower enforcement mechanism is an action brought by the Secretary in a United States district court. 29 U.S.C. §660(c)(2)."

The ALJ had also made a finding that Complainant's discharge was motivated in part by his demand for inclusion in a 401(k) pension plan following a corporate reorganization. The ARB noted that even accepting this finding as true, there was no legal basis for the ALJ or the ARB to find jurisdiction over a complaint based on alleged retaliation for asserting pension rights.

[Nuclear & Environmental Digest VII B 1]

SUBPOENAS; AUTHORITY TO ISSUE; EXERCISE OF DISCRETION TO ISSUE

In ***Childers v. Carolina Power & Light. Co.***, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), the ARB ruled that ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding. In so ruling, it was necessary for the ARB to revisit the decision of the Secretary of Labor in *Malpass v. General Electric Co.*, 1985-ERA-38 & 39 (Sec'y Mar. 1, 1994), which stated in dictum that ALJs lack subpoena power under the whistleblower provision of the ERA, 42 U.S.C. §5851, because §5851 does not delegate subpoena power by express terms. The ARB carefully reviewed statutory and decisional authority and made the following rulings:

1. Stare decisis does not prevent withdrawal of the *Malpass* dictum.

2. Administrative subpoenas are essential tools widely used by agencies responsible for assuring compliance with health and safety legislation

3. Although the *Malpass* dictum and other commentators have assumed that administrative subpoena power is delegable only by express statutory terms, closer review of the "express authorization" rule reveals that it is not relevant to the question of whether agencies are authorized to issue administrative subpoenas

4. Statutory mandates for agencies to provide formal trial-type hearings – *e.g.*, the ERA whistleblower provision – necessarily encompass subpoena authority (citing authority to effect that it would be incongruous to grant an agency authority to adjudicate and make findings of fact, without also providing the authority to assure the soundness of the fact finding).

5. An agency given the power to adjudicate is entitled to use subpoenas simply by virtue of the agency's discretion to choose procedural mechanisms. The ARB cited the examples of warrants – a far more intrusive procedural mechanism than subpoenas – as not being subject to an express authorization requirement; thus, if an agency can issue a

warrant when helpful, it must follow that subpoenas are a procedural device available to an agency when helpful.

The ARB noted that the ERA does provide express subpoena authority to the NRC in the conduct of its hearings, which can include whistleblower proceedings, but concluded that this could not be construed as evidence of purposeful exclusion of that authority to DOL given the 24-year interval between enactment of the two provisions, and the extensiveness and complexity of the ERA, to which the section 5851 provision plays only a supporting role.

6. Although *Malpass* suggested that the fact that the ALJ would not be able to punish noncompliance with subpoenas by contempt sanctions bears on the question of subpoena power *ab initio*, on closer review no connection exists between the question whether an agency has subpoena power and the fact that agencies lack power to impose civil or criminal contempt sanctions for noncompliance with agency subpoenas. Even agencies that have express subpoena authority lack power to impose contempt sanctions.

7. An unpublished Fourth Circuit decision relying on *Malpass* contains a ruling that an ALJ lacked subpoena authority under the whistleblower provision of the FWPCA, *Immanuel v. United States Dep't Labor*, 139 F.3d 889 (unpublished table decision) (4th Cir. 1998), 1998 WL 129932. The *Immanuel* court reasoned that administrative subpoenas must be authorized by express terms in the enabling legislation because §§555(d) and 556(c)(2) of the APA state that agencies may issue subpoenas in adjudications when "authorized by law." 5 U.S.C.A. §555(d) (agency subpoenas "authorized by law shall be issued to a party on request"); 5 U.S.C.A. §556(c)(2) (providing that, subject to published rules of the agency and within its powers, employees presiding at administrative hearings may issue subpoenas "authorized by law"). Thus, the court apparently assumed that the term "authorized by law" means "authorized by express statutory terms." The ARB, however, held that "Authorized by law" is clearly not the same as "authorized by explicit statutory text."

Although the ARB concluded that the ALJ erred in ruling that he did not have subpoena power, under the circumstances in ***Childers***, a remand was unnecessary because nothing in the administrative record indicated that the witnesses whom Complainant intended to subpoena could have materially aided him in establishing that Respondent's decision to fire him was influenced by protected activity.

One member of the Board issued a separate opinion, concurring in part and dissenting in part. The

member concurred with the ruling that the ERA implicitly empowers the ALJ with subpoena authority to compel the attendance of witnesses at hearing, but believed that, under *Mathews v. Eldridge*, 424 U.S. 319 (1976), a determination must be made as to whether due process compels issuance of the requested subpoenas in a particular case before an ALJ. The majority expressly disavowed the separate opinion to the extent that it diverged from the majority opinion.

[Nuclear & Environmental Digest VIII B 2 b]

RECORD BEFORE ARB; APPLICATION OF 29 C.F.R. § 18.54(c)

In ***Hasan v. Commonwealth Edison Co.***, ARB No. 00-043, ALJ No. 1999-ERA-17 (ARB Dec. 28, 2000), Complainant submitted new evidence in his rebuttal brief, and Respondent objected. Complainant filed a response to Respondent's objection, which also included extra-record information. Respondent again objected.

The ARB observed that it had previously held that it would rely on the Rules of Practice and Procedure for ALJ hearings at 29 C.F.R. § 18.54(c), when considering whether to admit new evidence. *Doyle v. Hydro Nuclear Services*, ARB No. 98-022, ALJ No. 1989-ERA-22 (ARB Sept. 6, 1996). Since Complainant did not assert that the proffered material was new evidence, nor did he argue that the evidence was unavailable to him prior to the close of the record, the ARB declined to consider the new material on appeal.

[Nuclear & Environmental Digest IX M 2]

***PRO SE* LITIGANT; REQUEST FOR SANCTIONS FOR ALLEGED VIOLATIONS OF RULES ON SUBMISSION OF EVIDENCE**

In ***Hasan v. Commonwealth Edison Co.***, ARB No. 00-043, ALJ No. 1999-ERA-17 (ARB Dec. 28, 2000), Complainant had submitted new evidence in his rebuttal brief, and Respondent objected. Complainant filed a response to Respondent's objection, which also included extra-record information. Respondent again objected, and moved for sanctions for repeated violations of the rules on submission of evidence. Although the ARB found that Complainant's submissions would not be permitted under 29 C.F.R. § 18.54(c) (once record closed, additional evidence may be received only if it is new and material, or was not readily available prior to the close of the record), it declined to impose sanctions, holding that a *pro se* litigant cannot reasonably be expected to plead his or her case with the precision of an attorney.

[Nuclear & Environmental Digest XI A 2 a]

CONTRIBUTING FACTOR; BURDEN OF PROOF ON COMPLAINANT

In ***Hasan v. Commonwealth Edison Co.,*** ARB No. 00-043, ALJ No. 1999-ERA-17 (ARB Dec. 28, 2000), Complainant was a contract engineer engaged as a design engineer during a two-year effort to restart a nuclear unit shut down to replace reactor fuel and perform corrective maintenance. During his employment, he raised a concern about correct modeling of a hinge. As a result of his raising of the concern, the modeling of the hinge was changed. At the end of the maintenance project, Complainant was released, together with hundreds of other contract engineers. Complainant subsequently filed a complaint with OSHA alleging that the reason for his termination was retaliation for raising a safety concern. The ALJ found that Complainant had not met his burden of proving that the protected activity contributed to the termination of his temporary employment. Respondent established that Complainant was brought on for a limited term – understood by everyone involved and normal practice in the trade. The ALJ also declined to find discrimination alleged by Complainant for Respondent's refusal to hire him for two temporary positions that opened after he was terminated from employment where the ALJ found that Complainant was not qualified for either position.

The ARB agreed with the ALJ's decision, noting that "[t]he complainant in an ERA whistleblower case has the burden of proof and that burden must be met by a preponderance of the evidence. *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997)." In the instant case, the ARB concurred with the ALJ that Complainant had not met his burden of proving that his protected behavior was a contributing factor in the personnel action. The ARB also held that even if Complainant had met that burden, Respondents had offered clear and convincing evidence that it would have taken the same action anyway.

[Nuclear & Environmental Digest XI A 2 a]

[Nuclear & Environmental Digest XIII B 8]

REFUSAL TO HIRE; *PRIMA FACIE* CASE NOT ESTABLISHED BASED MERELY ON COMPLAINANT'S UNSOLICITED APPLICATION FOR A JOB

In ***Hasan v. Commonwealth Edison Co.***, ARB No. 00-028, ALJ No. 2000-ERA-1 (ARB Dec. 29, 2000), Complainant, a contract engineer, filed an ERA whistleblower complaint alleging discriminatory refusal to hire. He had previously filed a complaint against the same Respondents based on alleged discriminatory discharge and refusal to rehire. The essential difference in the complaints was that Complainant remained unemployed.

While the first complaint was still pending on review before the ARB, Respondents filed motions to dismiss the second complaint with the ALJ, arguing that Complainant failed to allege facts necessary to establish a *prima facie* case under a "refusal to hire" theory. The ALJ issued an order to show cause why the motions should not be granted, and after consideration of Complainant's response, found that facts sufficient to establish a *prima facie* case had not been alleged. In the absence of a viable claim, the ALJ saw no reason for discovery or an evidentiary hearing, and therefore recommended that the ARB dismiss the complaint.

On appeal, Complainant – appearing *pro se* -- argued that the ALJ's proposed disposition of the matter would be contrary to the Secretary's decision in *Studer v. Flowers Baking Company of Tenn., Inc*., 1993-CAA-1 (Sec'y June 19, 1995) (Rule 12(b)(6) dismissal only appropriate when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint). Complainant argued that he would have been able to establish the facts in support of his claim if the ALJ had granted him discovery and an evidentiary hearing.

The ARB observed that a complainant must allege the elements of a *prima facie* case in a ERA whistleblower case. In regard to element three of a *prima facie* case – that the employer took some sort of adverse action against the complaint – four factors must be considered in a complaint grounded in alleged refusal to hire: the complainant must show: 1) that he or she applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his or her qualifications, he or she was rejected; and 3) that after his or her rejection, the position remained open. Thus, Complainant was required to at least allege that Respondents had a job opening for which he was qualified – something Complainant had not done.

The ARB also found that Complainant failed to satisfy element four of a *prima facie* case because he had not alleged the existence of any facts that would raise an inference that his protected activity was likely a contributing factor in Respondents' failure to respond to his unsolicited application. The ARB agreed with the ALJ that Complainant had done nothing more than simply allege that he submitted his resume to Respondents but remains unemployed – a naked allegation that is insufficient to support a claim of discrimination. The ARB concluded:

> A complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend the complaint in order to finally set forth well-pleaded allegations." *Oreman Sales v. Matshushita Elec. Corp*., 768 F.Supp. 1174 (E.D. La. 1991). If the complainant fails to allege a *prima facie* case, the matter is subject to immediate dismissal. *See Lovermi v. Bell South Mobility, Inc.*, 962 F.Supp. 136 (S.D. Fla. 1997). Given Complainant's failure to allege a *prima facie* case, we concur with the ALJ that the instant complaint should be

dismissed.

Slip op. at 5 (footnote omitted).

[Nuclear & Environmental Digest XI D 3 d]

DUAL MOTIVE; INTERVIEW PROCESS; PRESENCE OF BIASED INTERVIEWER ON PANEL MAY BE OVERCOME BY PROOF THAT SAME CONCLUSION WOULD HAVE BEEN REACHED EVEN IN ABSENCE OF COMPLAINANT'S PROTECTED ACTIVITY

In ***Higgins v. Alyeska Pipeline Services Corp.***, 1999-TSC-5 (ALJ Dec. 12, 2000), the ALJ issued a recommended decision finding that circumstantial evidence established that one member of a four member panel who interviewed Complainant for a job was influenced in her scoring of Complainant by her knowledge of Complainant's protected activity. The ALJ therefore evaluated the case under the dual motive test, which requires Respondent to prove by a preponderance of the evidence that it would have reached the same conclusion in the absence of protected activity.. *See Dartey v. Zack Company of Chicago*, 1982-ERA-2 at 6 (Sec'y, Apr. 25, 1983); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1987). The ALJ detailed the operations of the interview panel which did not discuss scores until completion of all interviews, and concluded that the panelist who was influenced by Complainant's protected activity did not cause Complainant not to be selected for the job. Excluding the one panelist's score, Complainant was still ranked only seventh out of eleven candidates for three jobs. No panelist placed Complainant in the top three. The ALJ noted in accessing the fairness of the selection process that:

> The Secretary has noted that "employee protection and anti- discrimination statutes [do] not displace an employer's judgment of what qualities it seeks in its employees and its good faith evaluation of those qualities." Blake v. Hatfield Electric Co., 87-ERA-4, at 8 (Sec'y Jan. 22, 1992). An employer's misjudgment of an applicant's qualifications is relevant insofar as it is "probative of whether the employer's reasons are pretexts for discrimination." Id. (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981)). The key inquiry is not whether Respondent designed the hiring process perfectly in order to select the "right" applicant but whether the process provided a pretext for discriminatory intent.

[Nuclear & Environmental Digest XII D 13]

PROTECTED ACTIVITY; COMPLAINT ABOUT FAIRNESS OF PERFORMANCE EVALUATION

In ***Childers v. Carolina Power & Light. Co.***, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB

Dec. 29, 2000), the ARB adopted the ALJ's holding that Complainant's complaint to his employer about the fairness of his performance evaluation was not protected activity within the meaning of the ERA whistleblower provision because it did not relate to the health and safety purposes of the ERA.

[Nuclear & Environmental Digest XVI E 1]

ATTORNEY'S FEES; COMPLAINANT NOT ENTITLED TO FEES AND COSTS ON SUCCESSFUL CHALLENGE TO SETTLEMENT AGREEMENT WHERE ORIGINAL COMPLAINT WAS NOT GROUNDED IN ALLEGATION OF DISCRIMINATION BASED ON OFFER OF SETTLEMENT WITH PROVISIONS THAT VIOLATED ERA

In ***Macktal v. Brown & Root, Inc.***, ARB No. 98-112, ALJ No. 1986-ERA-23 (ARB Jan. 9, 2001), the ARB found that Complainant was not entitled to attorneys fees and costs for proceedings before DOL and the Court of Appeals related to his successful challenge to a settlement agreement to which he had previously agreed. The proceedings in ***Macktal*** were complex. Complainant had entered into a settlement agreement, and was paid some monies by Respondent. Complainant, with new legal representation, subsequently disavowed the agreement upon review by the Secretary of Labor. The Secretary found that Complainant was bound to the agreement, but also found that one paragraph of the agreement was contrary to public policy and therefore severed it from the agreement. Complainant appealed to the Fifth Circuit, which held that the Secretary could not simply strike terms from a settlement agreement – the Secretary's only options were to enter the agreement by approving it or refuse to enter into by rejecting it. On remand, the Secretary disapproved the settlement and returned the case to the ALJ. On remand, the ALJ dismissed the case based on Fifth Circuit case law that internal complaints were not protected activity [the ERA has since been amended to explicitly include internal complaints]. On review, the ARB agreed with the ALJ's decision on the merits, but held that Complainant was entitled to attorney's fees for successful litigation on the settlement agreement issue. The ARB therefore remanded the case to the ALJ to consider a petition for attorney's fees and costs.

Upon review of the ALJ's recommended decision on the fee petition, the ARB concluded that the case was controlled by the intervening decision in *Harris v. Tennessee Valley Authority*, ARB No. 99-004, ALJ Nos. 1997-ERA-26 and 50 (ARB Nov. 29, 2000). Because Complainant's complaint was about alleged discriminatory discharge and not about the restrictive terms of a settlement agreement, his successful challenge to the settlement agreement did not meet the statutory elements required for an award of attorney's fees and costs. *See* slip op. at 6, detailing requirements of 42 U.S.C.A. §5851(b)(2)(A), as it appeared at the relevant time. The ARB distinguished the case of *Connecticut Light & Power Co. v. Secretary of Labor*, 85 F.3d 89 (2d Cir. 1996), in which the complaint was grounded in the allegation that Respondent had violated the ERA by offering him a settlement agreement with illegal "gag provisions." Since Macktal's complaint was not about the offer of settlement terms that violate the ERA, the Secretary never ruled that Respondent had discriminated against him for that reason. Thus, there was no hearing on this issue and no order issued providing

relief for such discrimination – both prerequisites to an award of attorneys fees and costs.

[Nuclear & Environmental Digest XX E]

ELEVENTH AMENDMENT; STATE SOVEREIGN IMMUNITY

In ***State of Florida v. United States of America***, No. 4:00cv445-RH (D.C. N.D. Fla Dec. 13, 2000) (case below 2000-CAA-19), the United States District Court for the Northern District of Florida granted a preliminary injunction barring further proceedings in *Shafey v. Florida Department of Health*, 2000-CAA-19, for a limited period to permit briefing and full and fair consideration of the State of Florida's suit to block the administrative proceedings on grounds of sovereign immunity and Eleventh Amendment immunity. Complainant Shafey is a former State of Florida employee seeking redress before the Department of Labor for allegedly having been fired by the State in violation of federal law.

[Nuclear & Environmental Digest XX E]

ELEVENTH AMENDMENT; STATE SOVEREIGN IMMUNITY; INTERVENTION BY OSHA

In ***State of Ohio Environmental Protection Agency v. USDOL***, No. C2-00-1157, 2000 WL 1721083 (N.D. Ohio Nov. 14, 2000) (case below "*Jayko*", ARB No. 01-009, ALJ No. 1999-CAA-5), the court issued a declaratory judgment that the regulations set forth in 29 C.F.R. Part 24 relating to claims made by individual complainants against the various States may only be applied consistent with the Eleventh Amendment where the Respondent is a State, if the United States Department of Labor elects to intervene as a party once the case proceeds to a hearing before an ALJ. The court gave the Department of Labor a period of time to decide whether it would intervene in the Jayko administrative proceedings. On January 10, 2001, the Assistant Secretary for OSHA filed with the ARB a Notice of Intervention, based on the Assistant Secretary's review of the ALJ's recommended decision and the record in the case. The Assistant Secretary, however, stated that "[t]his election to participate as a party is not intended, nor should it be construed, as a departure from the position of the United States that the Eleventh Amendment does not bar a private individual from participating as the sole complaining party in administrative proceedings under the employee protection statutes." Ass't Sec'y Notice of Intervention at 4-5. The Assistant Secretary also filed with the ARB a motion seeking a stay of ARB review of the case pending the Assistant's Secretary's decision whether to seek judicial review the district court's judgment.

[Nuclear & Environmental Digest XXI C]

LAW OF THE CASE; DOES NOT APPLY WHERE THERE IS INTERVENING,

CONTROLLING AUTHORITY

In ***Macktal v. Brown & Root, Inc.***, ARB No. 98-112, ALJ No. 1986-ERA-23 (ARB Jan. 9, 2001), the ARB had remanded the case for a recommended decision on attorneys fees on Complainant's successful challenge to a settlement agreement, even though after the settlement agreement had been voided, a hearing on the merits resulted in dismissal of the complaint. Prior to reviewing the ALJ's recommended decision on fees and costs, the ARB issued an intervening, controlling decision in *Harris v. Tennessee Valley Authority*, ARB No. 99-004, ALJ Nos. 1997-ERA-26 and 50 (ARB Nov. 29, 2000), which held that fees and costs are not available under the statute in a no-fault settlement. *Harris* is essentially based on the lack of an order by the Secretary finding discrimination – the order is a statutory prerequisite to an award of fees and costs. Similarly, in *Macktal*, there was no order finding discrimination in the circumstances surrounding the settlement agreement, and therefore a statutory prerequisite to an award of fees and costs was missing.

The ARB observed that the "law of the case" doctrine did not preclude it from revisiting the attorney's fee issue where there has been an intervening change in the law. The ARB wrote that the law of the case doctrine

> ...is a prudential rather than a jurisdictional restriction on a court's authority to reconsider an issue. *See Messenger v. Anderson*, 225 U.S. 436, 44, 32 S.Ct. 739 (1912). "When intervening legal authority makes clear that a prior decision bears qualification, that decision must yield." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990). *See also*, *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 738-41 (D.C. Cir. 1995).

Slip op. at 6 n.7.

[Nuclear & Environmental Digest XXI C]

STARE DECISIS; DEPARTURE APPROPRIATE IF EARLIER RULING DOES NOT WITHSTAND SCRUTINY

In ***Childers v. Carolina Power & Light. Co.***, ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000), the ARB reversed authority to the effect that ALJs do not have the authority to issue subpoenas in whistleblower cases because of the absence of express statutory authority. In regard to the principle of stare decisis, the Board wrote:

> Adherence to decisional law promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. "Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 258 U.S. 393, 406, 52 S.Ct. 443, 447 (1932) (Brandeis, J., dissenting). At the same time, however, *stare decisis* is not an inexorable command; rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 60 S.Ct. 444, 451 (1940). "[W]hen governing decisions are unworkable or are badly reasoned, '[the Supreme Court] has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609 (1991) (internal citation omitted). The reasons for reversing an earlier ruling are always *sui generis*, but if a useful generalization can be made, it is that "[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved. The opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828, 111 S.Ct. at 2610 (internal citations omitted); *cf*. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 276, 114 S.Ct. 2251, 2257 (1994) (renouncing earlier conclusion concerning meaning of APA phrase "burden of proof" because first analysis was "cursory" and did not "withstand[] scrutiny").

SURFACE TRANSPORTATION ASSISTANCE ACT WHISTLEBLOWER DECISIONS

[STAA Digest V A 4 b iii]

REASONABLE APPREHENSION; COMPLAINANT'S CREDIBILITY; RESPONDENT'S FAILURE TO PRODUCE INSPECTION AND REPAIR RECORDS

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ARB agreed with the ALJ's weighing of the evidence concerning whether Complainant had a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition. *See* 29 U.S.C.A. §31105(a)(1)(B)(ii). The ALJ took into account that Complainant was a very experienced truck driver who had driven the truck in question six days a week for about ten months; that his testimony that the truck was slowing down and speeding up sporadically was uncontradicted and believed by a company vice-president; that the Complainant's testimony that during the first part of the trip other trucks had to take evasive action as a result of the speed control problems was credible; the weather forecast for the night of the trip compounded Complainant's concerns;

Complainant's case was supported by an expert witness who testified in detail about the dangers caused by a truck's tendency to slow down unexpectedly.

The ALJ found Respondent's response -- essentially an attempt to prove that the truck was safe -- to be unpersuasive. Respondent presented an e-mail from the driver who replaced Complainant; however, the ALJ and the ARB found that the e-mail was ambiguous and therefore entitled to no weight; both the ALJ and the ARB viewed with suspicion Respondent's failure to produce inspection and repair records for the vehicle. Moreover, the ARB agreed with the ALJ's observation that Complainant was not required to prove that the safety defect in fact existed; rather, Complainant's apprehension was supported by his experience with the truck that evening, especially when viewed in light of earlier recent experience with the truck, the weather forecast, and "common sense."

[STAA Digest IX B 2 a iii]

BACK PAY; FAILURE OF RESPONDENT TO ESTABLISH PRECISE AMOUNT OF WEEKLY EARNING OF COMPLAINANT BEFORE ALJ

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), Respondent argued on appeal to the ARB that the ALJ had erred in estimating Complainant's salary at $1,000 per week for purposes of calculating back pay, maintaining that pay records showed that the average weekly wage was actually $902.33. The ARB reviewed the relevant exhibit and found that the ALJ's finding was consistent with this evidence. The ARB faulted Respondent for not making its argument before the ALJ.

[STAA Digest IX B 2 b viii]

POST-JUDGMENT INTEREST

A complainant who is successful on the merits is entitled to post-judgment interest, calculated in the same manner as pre-judgment interest, for any period between the issuance of the ARB's final order and the payment of the back pay award. ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000).

[STAA Digest IX B 3 e]

COMPENSATORY DAMAGES; EMOTIONAL PAIN AND SUFFERING

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000),

Complainant requested $500,000 for emotional pain and suffering and mental anguish. While finding it credible that Complainant suffered such pain and stress as the result of his wrongful termination, the ALJ found that the requested amount was "ridiculously high." He also observed that Complainant had failed to put forth a reasonable monetary estimate of such damages, but based on the totality of the record and a comparison with similar cases, found that an award of $20,000 was appropriate. Respondent challenged the award as arbitrary and capricious.

The ARB characterized the award as modest and reasonable under the circumstances, pointing to evidence of record that Complainant had to file for bankruptcy and divest belonging, that he had been unable to seek treatment for a hernia, and that Complainant had gained weight from depression and stress. Complainant also testified that he had trouble sleeping and that his self-esteem had been damaged. On this basis, the ARB found that the award was supported by substantial evidence.

[STAA Digest IX C]

ATTORNEY'S FEES; RATE FOR PRIVATE ATTORNEY WHO NORMALLY CHARGES LOWER RATE FOR PUBLIC INTEREST CASES

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ARB wrote:

> To the extent that we have not already done so in other attorney's fees decisions, we explicitly adopt the view articulated by the Court of Appeals for the District of Columbia Circuit in *Save our Cumberland Mountains, Inc. v. Hodel (SOCM)*, 857 F.2d 1516, 1524 (D.C. Cir. 1988)(en banc) that "the prevailing market rate method . . . used in awarding fees to traditional for-profit firms and public interest services organizations" should "apply as well to those attorneys who practice privately and for profit but at reduced rates reflecting non-economic goals." *See also Covington v. District of Columbia*, 57 F.3d 1101 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 916 (1996).

Slip op. at 10. Thus, the ARB held that "the fact that an attorney often charges below-market rates for public interest clients does not preclude such an attorney from charging higher, market rates in other public interest litigation." *Id*.

In *Murray*, counsel was awarded hourly rates of $335.00 for 1999, and $340.00 for 2000, where the *Laffey* Matrix supported the rate for location where the hearing took place (Washington, D.C.), counsel submitted supporting affidavits, and counsel had demonstrated to both the ALJ and the ARB

that his experience, reputation and expertise would enable him to command top dollar should he choose to do so (Counsel's normal rate for public interest clients was $235 per hour in 1999 and $250 in 2000). Both the ALJ and the ARB had been impressed – the ALJ characterizing counsel's work as "outstanding" and the ARB expressing the "wish that attorneys with his skill and dedication would appear before this Board with greater regularity." Slip op. at 11.

[STAA Digest IX C]

ATTORNEY'S FEES; TIME PRIOR TO ACTUAL FILING OF COMPLAINT

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ARB noted that "attorney's fees are recoverable for time spent on a case prior to the actual filing of the complaint. *See, e.g. Webb v. County Board of Education of Dyer County*, 471 U.S. 234, 243 (1984)." Slip op. at 11 n.11. The ARB, however, did deduct several hours from the fee petition that were billed for a period when Counsel was not representing Complainant.

[STAA Digest IX C]

ATTORNEY'S FEES; TIME PREPARING THE FEE PETITION

In ***Murray v. Air Ride, Inc.***, ARB No. 00-045, ALJ No. 1999-STA-34 (ARB Dec. 29, 2000), the ARB rejected the ruling in *Hilton v. Glas-Tec Corp*., 1884 STA-6 (Sec'y July 15, 1986), indicating that an attorney is not entitled to fees for time spent in preparing his fee petition. The ARB found that more recent decisions by the Secretary of Labor have taken the opposite, and correct position. *See Spinner v. Yellow Freight System Inc.*,1990-STA-17 (Sec'y); *Clay v. Castle Coal and Oil Co. Inc*, 1990-STA-37 (Sec'y), *rev. on other grounds*, 55 F.3d 41 (2d Cir. 1995).